United States Postal Service *and* American Postal Workers Union, AFL–CIO. Case 5–CA–19444(P)

March 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 7, 1989, Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.[1] The Respondent filed an answering brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The amended complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by closing postal facilities on Saturday, December 26, 1987, and Saturday, January 2, 1988, by reducing window service hours on February 13, 1988, and by discontinuing Sunday collection work and processing of originating mail on February 14, 1988, without affording the Union an opportunity to bargain with respect to any of these changes. The judge dismissed the amended complaint. He found no bargaining obligation on the part of the Respondent because he concluded that, in response to a budget reduction mandated by Congress in 1987, the Respondent decided to make changes that did not ''turn upon labor costs'' and which impinged on labor costs to an ''incidental and secondary'' degree.[4] We disagree with the judge's failure to find a violation for the following reasons.

At all material times, the Union has represented a nationwide unit of 270,000 full-time and 70,000 part-time clerical, maintenance, motor vehicle, and special delivery messenger employees of the Respondent. Since 1971 the Respondent and the Union have been parties to successive collective-bargaining agreements, including the National Agreement effective from 1987 to 1990. As found by the judge, article 3 of the National Agreement, the management-rights clause,[5] has been interpreted by some arbitrators as enabling the Respondent to make certain unilateral operational changes not inconsistent with other contractual provisions.[6]

[1] The Charging Party also submitted three notices of recent authority identifying the Board's decisions in *Dubuque Packing Co.*, 303 NLRB 386 (1991), *Register-Guard*, 301 NLRB 494 (1991), and *General Electric Co.*, 296 NLRB 844 (1989). The Respondent filed a response to the Charging Party's notice regarding the Board's decision in *Dubuque Packing*. The Charging Party filed a motion to reject the Respondent's response or alternatively to file a reply brief. The Charging Party's motion is denied.

[2] The Respondent filed a motion to reopen the record to receive a speech given by the union president on January 8, 1990, which purportedly constitutes ''new'' evidence to the effect that the Union acknowledged that the Respondent's actions in 1988 were in response to a budget cut imposed by Congress and outside the Respondent's control. The General Counsel and the Charging Party filed oppositions to the Respondent's motion. We deny the motion because the evidence sought to be added by the Respondent is cumulative and would not require a different result.

[3] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Finding no bargaining obligation, the judge also found it unnecessary to reach the Respondent's alternative defense of waiver. He, however, made certain factual findings relating to whether the Union had waived its right to engage in decisional bargaining.

[5] Art. 3 reads as follows:

> The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
>
> A. To direct employees of the Employer in the performance of official duties;
>
> B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
>
> C. To maintain the efficiency of the operations entrusted to it;
>
> D. To determine the methods, means, and personnel by which such operations are to be conducted;
>
> E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
>
> F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

[6] In reaching this finding, the judge reviewed arbitral decisions received as evidence that dealt with whether the Respondent had the exclusive right (1) to revise one of its handbooks to allow ''on the fly'' rotation between keyboard operators on the letter sorting machines; (2) to abolish a level 5 manual distribution and window clerk relief position at a particular station due to a change in distribution needs; (3) to excess three parcel post positions at a particular office due to the effects of a major equipment change at that location; (4) to make several staffing changes at one of its locations for efficiency reasons; (5) to apply new work and time standards in establishing new routes for letter carriers; (6) to make changes affecting unit employees that had been prompted by its decision to eliminate certain air taxi routes; and (7) to determine the proper salary level for a review clerk position.

In addition, the judge found that Postal Service regulations authorize the Respondent to adjust hours of window service, mail collection schedules, and mail processing and to discontinue or suspend post office operations. We observe that the regulations themselves do not clearly apply to the kind of employer decision at issue here. In addition, the record does not provide any information as to the origin, effect, or implementation of these regulations or whether the Union was involved or acquiesced in their development or application.

As more fully discussed by the judge, over the years, the Respondent has also made certain operational changes, including the creation of bulk mail centers in the 1970's, the initiation of the area mail processing program in the 1970's, and the implementation of the window hours adjustment program in 1986, that have affected employees' work hours and schedules. On those occasions, the Union did not request bargaining, nor did any bargaining occur.

On December 22, 1987, the Omnibus Budget Reconciliation Act of 1987, Public Law 100–203 (OBRA), was enacted and required, inter alia, the Respondent to reduce its operating costs in fiscal years 1988 and 1989 by $160 million and $270 million, respectively, to make corresponding payments to the employee health benefits fund, and to submit a plan implementing these budget reductions to Congress by March 1, 1988.[7] OBRA, however, did not dictate the particular items of the Respondent's budget that had to be reduced.

The Respondent held meetings on December 23, 1987, January 14, 21, and 29, 1988, and February 5, 1988, to provide information to the Union about the areas being considered by the Respondent for the 1988 budget cut. The parties do not contend that any of these meetings constituted decisional bargaining sessions.

At the December 23 meeting, the Respondent told the Union, inter alia, that it had decided to close selected retail service outlets on December 26, 1987, and January 2, 1988. During the January 14 meeting, the Union suggested several labor costs areas for the proposed budget cuts including reducing ''premium pay'' for employees doing Sunday, nighttime, and overtime work and reducing nonunit ''casual employees.'' The Respondent indicated that it would consider these suggestions.

The day before the January 21 meeting with the Union, the Respondent made a general announcement disclosing, inter alia, that the Respondent had decided that approximately two-thirds of the mandated reduction for fiscal year 1988 would be saved through reduced administrative expenditures and related adjustments in work hours with the remaining one-third reduction to be saved by adjusting postal services. Regarding the savings in postal services, the Respondent specified that Sunday mail processing and collection work would be adjusted and that retail service hours would be adjusted ''by one half day per week on average.'' The Respondent also indicated that it expected the above changes to be completed within 30 to 60 days to give its local managers time to complete plans and notify the public.

[7] On February 26, 1988, the Respondent complied with this portion of OBRA by submitting to Congress the required implementation plan for 1988 budget reductions.

The Respondent estimated that approximately $60 million in labor costs would be saved through the reductions in window service hours (including the two Saturday closures) and the Sunday mail processing and collection work.[8] According to the credited testimony of John Mulligan, the Respondent's assistant postmaster general, the approximately $40 million expected in savings from the reduced window service hours ''was directly related to labor costs'' and reflected a ''reduction in labor costs''; that the approximately $17 million expected in savings from the Sunday service reductions ''would be labor costs''; and that the two Saturday closures resulted in ''labor cost savings.''[9] Although he predicted no layoffs of unit employees, Mulligan anticipated that there would be some employee reassignments, changes in schedules, reductions in overtime, and reduced work hours.

At their January 21 meeting, the Union presented the Respondent with a letter dated January 20, 1988, which contained a formal request for bargaining over the Respondent's decision to make these service hours reductions and over the effects of these reductions on unit employees. The Respondent did not respond to the Union's bargaining request at that time.

The next day, the Respondent issued a memo for its regional postmasters general, with attached implementing instructions advising the regional postmasters of the Respondent's plan for the reduction of window operations and the elimination of Sunday collections and processing of outgoing mail. This memo indicated that the window service adjustments would be effective February 13, 1988, and that the elimination of Sunday collections and outgoing mail processing would be effective February 14, 1988. The Respondent forwarded a copy of this memo to the Union on January 27, 1988.

At their January 29 meeting, the Respondent and the Union agreed that the local unions would be given the option of waiving the posting requirements of the National Agreement with respect to any changes that might be made to employees' assignments or days off as a result of the service hours reductions. This agreement involving a waiver of contract posting requirements was embodied in a written memorandum of understanding executed by the parties on February 1, 1988.

At their last meeting held on February 5, the Respondent and the Union discussed, inter alia, whether the window service hours reductions planned by the

[8] As noted by the judge, on October 31, 1988, the General Accounting Office (GAO) concluded that the 1988 budget reduction of $160 million had been met by the Respondent, but GAO was unable to determine how much of the estimated $60 million in labor costs saving was actually achieved.

[9] The Respondent also admits in its posthearing brief that these actions reduced labor costs.

Respondent would be 9 or 10 percent and would be accomplished by region or be divisionwide.

As stipulated by the parties, on February 13, 1988, the Respondent began a nationwide reduction in retail window service and, on the following day, began elimination of the nationwide Sunday collection and processing of outgoing mail.

By letter dated February 19, 1988, the Respondent replied to the Union's January request for decisional and effects bargaining. In this letter, the Respondent stated, inter alia, that it ''does not have an obligation to collectively bargain concerning changes in postal services'' but ''will, however, continue to consult with [the Union] concerning such changes.'' On February 22, 1988, the Union filed the instant unfair labor practice charge. Subsequently, in September 1988, the Respondent partially restored the retail services previously adjusted.[10]

From the judge's view of the facts, the operative decision to analyze in determining the Respondent's obligation to bargain was the Respondent's decision to reduce its operating cost in fiscal year 1988 by $160 million. In making that decision, which was congressionally mandated by OBRA, the judge noted that the Respondent specifically sought to achieve the bulk of the savings by reducing administrative expenditures rather than by reducing its service activities. In line with this objective, the Respondent achieved two-thirds of the mandated savings by reducing administrative expenditures, with the remaining one-third to come from savings in labor costs. Applying the Board's plurality decision in *Otis Elevator Co.*, 269 NLRB 891 (1984),[11] the judge thus concluded that there was no obligation to bargain over the decision to reduce operating costs because the Respondent, ''in responding to the budget mandate of Congress, was not motivated by labor costs, its determinations did not turn upon labor costs, and to the extent there was an impact on unit labor costs, such impact was incidental and secondary.''

Our disagreement with the judge's analysis begins with his characterization of the decision to be analyzed. Even if we agreed with the judge that the Respondent's initial decision to reduce its operating costs by $160 million in fiscal year 1988 was not a mandatory subject of bargaining, it does not follow that each subsequent decision that the Respondent made to achieve those savings was similarly insulated from a duty to bargain. Once the Respondent determined that it had exhausted its administrative cutbacks and that it could achieve the remaining $60 million in reductions only through labor cost savings, its bargaining obligation commenced. Thus, the Respondent's decision to reduce labor costs by $60 million by the two Saturday closures, the retail window service reductions, and the elimination of Sunday mail processing and collection work was a separate and distinct decision from its initial decision. It was not the inevitable outcome of the initial decision, but rather was only one of a number of possible changes the Respondent could have made.[12] Accordingly, we find that the Respondent's decision to reduce its labor costs is severable from its decision to comply with the dictates of OBRA and must be analyzed separately from that decision.

The Respondent's decision to cut labor costs by its Saturday closures, reducing retail window service, and eliminating Sunday mail processing and collection work amounted to a decision to reduce work hours—a matter literally within the scope of an employer's obligation to bargain as defined in Section 8(d) of the Act.[13] Characterizing the decision as simply a reduction in employee work hours rather than a ''partial closing'' as that term is used in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), seems appropriate because the Respondent's decision was not to abandon a particular line of business or to cease a contractual relationship with a particular customer. Rather the Respondent was seeking simply to limit the number of hours that employees would spend engaging in the Respondent's basic business: collecting and processing mail and dealing with the public concerning postage. Thus, we find that this decision constitutes that type of management decision that is ''almost exclusively 'an aspect of the relationship''' between employer and employees and as to these there is an obligation to bargain. Id. at 677. Accordingly, we find that the Respondent's decision to reduce its labor cost by the two Saturday closings, the retail window service reductions, and the elimination of Sunday mail processing and collection work was a mandatory subject of bargaining.

The Respondent contends that even if its decision were a mandatory subject of bargaining, the Union waived its right to bargain over that decision. It is well established that a waiver of statutory bargaining rights must be clear and unmistakable.[14] On the basis of article 3 of the National Agreement, together with the bar-

[10] The Union again requested bargaining, and the Respondent refused.

[11] Subsequent to the judge's decision, the Board overruled *Otis Elevator* in its decision in *Dubuque Packing Co.*, 303 NLRB 386 (1991).

[12] For example, the Respondent could have achieved its overall cost savings by reducing further its administrative costs or it could have reduced labor costs in areas other than the ones it chose, such as areas the Union suggested.

[13] Sec. 8(d) provides, in pertinent part, that ''to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

[14] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Dubuque Packing Co.*, supra.

gaining history and past practice concerning certain other operational changes, previously discussed infra, the Respondent argues that the Union waived its right to bargain over the decision to make the 1988 fiscal year labor cost reductions. After careful examination, we find that article 3, neither on its face nor as interpreted by the arbitrators whose decisions were received into evidence, specifically refers to the type of employer decision or mentions the kind of factual situation presented here. We also find that the bargaining history, past practice, and union conduct regarding the other operational changes relied on by the Respondent is of no significance because these changes likewise dealt with entirely different matters.[15] We, therefore, reject the Respondent's waiver argument.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged by the amended complaint when it admittedly refused to bargain with the Union over the labor-cost budget reductions.[16]

CONCLUSION OF LAW

By failing and refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit concerning the decision to cut labor costs for the 1988 fiscal year by reducing window service hours and discontinuing Sunday mail collections and processing of originating mail, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the Respondent's decision to cut labor costs for the 1988 fiscal year, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain action to effectuate the policies of the Act.

Having found that the Respondent failed to bargain over the decision to cut labor costs for the 1988 fiscal year in violation of the Act, we shall order the Respondent to bargain with the Union concerning that decision to cut labor costs and the effects of that decision. We shall order the Respondent to make whole unit employees for their losses, if any, that resulted from the Respondent's decision to cut labor costs for the 1988 fiscal year by reducing window service hours and discontinuing Sunday mail collections and processing of originating mail. We shall leave the determination of losses suffered by the employees to the compliance stage of this proceeding. Backpay is to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, because the Respondent's failure to bargain about its decision to cut labor costs affected employees nationwide, we shall order the Respondent to post an appropriate notice to employees at all its various facilities throughout the United States, including its facility at 475 L'Enfant Plaza S.W., Washington, D.C.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with American Postal Workers Union, AFL–CIO as the exclusive representative of its clerical, maintenance, and motor vehicle employees and special delivery messengers in the appropriate unit set forth in the National Agreement between the Respondent and the Union, about decisions entailing changes in mandatory subjects of bargaining.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the decision to reduce labor costs for the 1988 fiscal year and the effects of that decision.

(b) Make whole unit employees for their losses, if any, that resulted from the Respondent's decision to cut labor costs for the 1988 fiscal year by reducing window service hours and discontinuing Sunday mail collections and processing of originating mail. Backpay is to be computed in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[15] Even if the Union failed to challenge prior labor-cost reductions, ''[a] Union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' *Johnson-Bateman Co.*, 295 NLRB 180 (1989) (citation omitted).

[16] In view of our conclusion that the Respondent failed to satisfy its obligation to engage in decisional bargaining, we find it unnecessary to pass on the complaint allegations and the judge's waiver finding relating to the effects bargaining issue. We also find it unnecessary at this stage of the proceeding to pass on the Respondent's argument that given the size and complexity of its operation and the variety of settings in which the changes at issue were implemented, the extent of monetary loss suffered by the employees cannot be proven. As is our customary practice, we leave such matters to be resolved in compliance proceedings.

records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its various facilities throughout the United States, including its facility located at 475 L'Enfant Plaza, S.W., Washington, D.C., copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, dissenting in part.

For the reasons stated by my colleagues, I agree that the Respondent's decision to reduce its labor costs by $60 million by closing on two Saturdays, reducing retail window service, and eliminating Sunday mail processing and collection work was a mandatory subject of bargaining. Contrary to the majority, however, I would not resolve whether the Union waived its right to bargain over this decision. Rather, I would remand this case to the administrative law judge for the taking of additional evidence, if necessary, and to determine whether the Union waived its bargaining rights by virtue of, inter alia, applicable provisions of the Postal Reorganization Act, Postal Service regulations, the collective-bargaining agreement, and prior conduct by the parties.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with American Postal Workers Union, AFL–CIO as the exclusive representative of our clerical, maintenance, and motor vehicle employees and special delivery messengers in the appropriate unit set forth in the National Agreement between the Postal Service and the Union, about decisions entailing changes in mandatory subjects of bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the decision to reduce labor costs for the 1988 fiscal year and the effects of that decision.

WE WILL make whole unit employees for their losses, if any, that resulted from the Respondent's decision to cut labor costs for the 1988 fiscal year by reducing window service hours and discontinuing Sunday mail collections and processing of originating mail. WE WILL pay backpay plus interest for such losses.

UNITED STATES POSTAL SERVICE

James E. Horner, Esq., for the General Counsel.
Karen A. Intrater, Jesse L. Butler, and *R. Andrew German, Esqs.*, for the Respondent.
Anton G. Hajjar, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on February 22 and a complaint issued on August 30, 1988. General Counsel contended that on January 14, 1988, Respondent Postal Service, in response to the budget reduction requirements of the Omnibus Budget Reconciliation Act, informed the Union of its decision to reduce window service hours and discontinue Sunday collection and processing of originating mail; that on January 20, the Union requested the Employer to bargain with it over this decision and the effects of these changes; and that on February 13, the Employer implemented these changes without affording the Union an opportunity to negotiate and bargain as the representative of its employees in an appropriate unit, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act. Respondent Postal Service, in its answer, denied violating the Act as alleged. Hearings were held on the issues raised in Washington, D.C., on February 27 and 28 and March 1, 1989. General Counsel was permitted over objection to amend the complaint on March 1 to include the Employer's related decision to close facilities on Saturday, December 26, 1987, and on Saturday, January 2, 1988, as part of the Employer's alleged unlawful unilateral action. (See Tr. 546–555, 601–603.)

Counsel for Respondent Postal Service argues, inter alia, that the Postal Service's reduction of its fiscal year 1988 budget was not a decision which turned on labor costs; that there was no substantial impact on the bargaining unit shown here; and that, in any event, the Union waived its right to bargain over the decision in question and the effects of this decision. Counsel for General Counsel and the Union argue that the Employer had a duty to bargain because the three cited actions undertaken here by the Employer turned directly on labor costs and the case is therefore governed by *Otis Elevator Co*., 269 NLRB 891 (1984); and, further, that the Union has not waived the right to bargain. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. BACKGROUND; THE COLLECTIVE-BARGAINING AGREEMENT AND EARLIER CONDUCT OF PARTIES

The Postal Reorganization Act, 39 U.S.C. § 101 et seq., created the Postal Service in 1971, directing, inter alia, that the Postal Service ''provide prompt, reliable and efficient services,'' and authorizing it to ''maintain the efficiency of the operation entrusted to it'' and ''to determine the methods, means and personnel by which such operations are to be conducted.'' See sections 101 and 1001(e). The Postal Service and the Charging Party Union, American Postal Workers Union, AFL–CIO, as well as National Association of Letter Carriers, AFL–CIO, have been parties to successive collective-bargaining contracts covering appropriate units of employees since 1971.[1] The most recent contract between the Postal Service and American Postal Workers Union and National Association of Letter Carriers, effective from 1987 to 1990 (Jt. Exh. 2), continues to maintain the same ''management rights'' provisions. Thus, article 3 of the current contract continues to provide that the Employer ''shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations,'' to ''direct employees . . . in the performance of official duties''; ''hire, promote, transfer, assign and retain employees . . . and suspend, demote, discharge or take other disciplinary action''; ''maintain the efficiency of the operations entrusted to it''; ''determine the method, means and personnel by which such operations are to be conducted''; and ''take whatever action may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.''

Article 3 of the contract has been determined by arbitrators at both national and regional levels as enabling the Postal Service to make unilateral operational changes not inconsistent with other contractual provisions. (See R. Exh. 21, p. 5; R. Exh. 22, p. 8; R. Exh. 23, p. 3; R. Exh. 24, p. 7; R. Exh. 25, p. 20. See also R. Exh. 7, pp. 19 to 20. Cf. C.P. Exh. 7, which involved a dispute with respect to the proper evaluation of a newly established position.) See also *Postal Service*, 203 NLRB 916 (1973), where the Board, in agreement with the administrative law judge, in a case involving the Letter Carriers Union, concluded that the employer did not violate Section 8(a)(5) of the Act by unilaterally altering terms and conditions of employment by changing work assignments. The Board relied on, inter alia, the ''management rights'' language of article 3 of the contract, noting:

> To be sure, the clause provides that these rights shall be ''subject to the provisions of this agreement and consistent with applicable laws and regulations,'' and Art. V . . . as General Counsel stresses . . . prohibits ''unilateral actions violative of the National Labor Relations Act.'' I do not regard the qualifying language as negativing the managerial rights preserved by Art. III, particularly in view of the broad managerial-assignment discretion set forth in employee job descriptions next described. Art. V appears to be nothing more than an undertaking, not uncommon n labor agreements, that the Employer will abide by his obligations under contract and law.[2]

Postal Service regulations authorize the Employer to adjust hours of window service, mail collection schedules, and mail processing and to discontinue or suspend post office operations. (See G.C. Exh. 1(j); Exh. 9 attached to Mulligan declaration in Motion for Summary Judgment.) And, as discussed below, the Employer in the past has made numerous changes in its operations and services without affording the Charging Party Union an opportunity to bargain over the underlying decision. The Employer's changes, however, must concededly be in compliance with the pertinent provisions of its collective-bargaining agreement which, as demonstrated below, principally pertain to the effects of such decisions. Thus, as Assistant Postmaster General John Mulligan testified, after describing such operational and service changes in the past, ''I never saw any bargaining over any of these issues'' and ''I never heard of any demand for bargaining''—it was the ''policy'' of the Employer ''not to bargain over such decisions.''

Articles 12 and 37 of the collective-bargaining agreement provide for the reassignment of unit employees and posting of new assignments, including the discontinuance of an independent installation and the consolidation of an installation.[3] Robert Templeton, a regional manager of labor relations for the Postal Service, testified that article 12 applies ''regardless

[1] The jurisdictional allegations of the complaint; the labor organization status of the Charging Party Union; and the allegations that the Charging Party Union represents an appropriate unit of the Respondent Postal Service's employees are admitted. It is undisputed that the Charging Party Union represents clerical, maintenance, motor vehicle, and special delivery messenger employees of the Employer, including, inter alia, window clerks, letter sorting machine operators, central markup clerks, distribution clerks, secretaries, and mail processors. Charging Party Union represents a total of 270,000 full-time and 70,000 part-time unit employees.

[2] The above decision, as stated, did not involve the Charging Party Union, rather, it involved the same jointly bargained contract language impacting on employees represented by the Letter Carriers Union. Moreover, the decision, by its own terms, is apparently confined to the ''special circumstances in [that] case.''

[3] See sec. 5 of art. 12, Jt. Exh. 2, which provides for the reassignment of employees where, inter alia, there is a discontinuance of an installation, a consolidation of an installation, a transfer of a station or branch, a reassignment of employees excess to the needs of an installation, a reduction in the number of regular work force employees of an installation other than by attrition, and the reassignment of part-time flexibles in excess of quota.

of the reason the employee is being excessed from the section'' including a ''reduction in service''; that the Postal Service is not obligated to bargain over such decisions and to his knowledge has never bargained over a decision to ''excess or reassign an employee''; that there have been ''hundreds'' of such instances over the years; and that one such decision pertained to the establishment of the Employer's 21 national bulk mail centers in the 1970s which involved the reassignment of ''thousands'' of employees. Templeton explained on cross-examination that part-time flexible employees are also covered by article 12. (See art. 12.5C8 of Jt. Exh. 2.) Templeton further testified that article 37, which applies to clerk craft employees, provides for changing the scheduled workdays, duties, and starting times for full-time employees; that a ''lot of things could happen'' to cause such a change including ''a change in transportation,'' ''a drop in mail volume,'' the use of ''area mail processing'' or a ''scheduling staffing study'' or ''function review''; and that here too ''there is no bargaining'' and the Employer is only required to comply with the provisions of the contract. (See also R. Exh. 7, pp. 19 to 20.)[4]

Assistant Postmaster General Mulligan testified about past operational changes made by the Employer which have affected employees' work hours and schedules. Mulligan cited the creation by the employer in the 1970s of bulk mail centers, the implementation over the years of area mail processing, automation plans which have been implemented since the early 1980s and recent transportation contracting changes as a consequence of the deregulation of the airline industry. Mulligan explained that the creation of bulk mail centers, ''in [his] postal career . . . [had] the largest probably operational impact on people that [he has] seen . . . there were 21 bulk mail centers . . . the smallest ones might have 800 people . . . the largest had over 3000''; the relocation or changes of employees' assignments or schedules ''across the country'' affected a minimum of 20,000 and maximum of 50,000 employees ''in terms of secondary effect from bumping''; and the changes ''primarily'' affected unit employees of the Charging Party Postal Workers Union and ''mail handlers.''[5] Mulligan noted, as recited above, that there was no bargaining over any of these decisions; he ''never heard of any demand for bargaining''; and it was the Employer's ''policy'' ''not to bargain'' over such decisions.

Operations Director Nick Barranca testified that the Employer's area mail processing program, initiated in the 1970s and continuing to the present, ''is used to reduce direct labor costs''; the Employer ''has deployed mechanized and automated equipment at major processing centers''; there were predecisional cost studies prepared indicating that this program was intended to reduce labor costs; and published guidelines, shown to the Postal Workers Union, ''indicate the impact that area mail processing will have or does have on the bargaining unit.'' (See R. Exhs. 37, and 34–36.) Barranca recalled that he ''had contact with Union officials'' in the past ''at the national level'' ''regarding area mail processing''; and the Union never requested bargaining ''over decisions to implement area mail processing'' or ''over the impact.''

Contract Administration Director William Downes corroborated the above testimony. Downes explained that area mail processing programs affect clerk craft employee schedules, their work hours, and starting times; that such programs take mail processing from outlying postal offices and move the processing to central locations; that ''we're implementing and have implemented'' such programs ''for years all over the postal service''; and that there has been no bargaining with the Charging Party Union over such decisions. Downes further testified that the Employer initiated a window hours adjustment program in 1986 on a national basis affecting employees in every post office with window service; that guidelines furnished to the Charging Party Union indicated that this program may require schedule changes for unit employees; and that the Union never requested bargaining over ''these changes.'' (See R. Exh. 32.) In addition, Downes generally testified that ''there is always a tightening of the belt that comes . . . that could have very well have been much more than the magnitude of [the instant] budget cut''; that ''because of our . . . internal budget restrictions oftentimes we have to put out the word to tighten up'' resulting in restrictions on hiring; that ''the type of cutback here could have gone on at any time under the usual budgetary process''; that such ''budget reductions are made every day''; and that there has been no bargaining with the Charging Party Union over such determinations.

Budget Director Kenneth Burditt testified that the Postal Service develops its own budget; that the ''Postal unions'' are not involved in developing the budget and are given no advance information; that in 1985 ''we found ourselves in a situation where our service was being degraded and our expenses were way over our plans''; that ''we put in a cost reduction plan''; that this ''publicized'' plan lowered the hourly labor cost by reducing overtime and hiring more new employees at a lower hourly rate; that the effects of this plan had a ''fairly universal impact'' on employees including the unit personnel represented by the Postal Workers; that there was no request for bargaining over these budget changes; and that the Employer as a matter of ''policy'' would not bargain over such a budget change. Burditt next identified a 1986 ''cost containment'' plan. Burditt explained that ''some impositions . . . were placed on us by the administration after the beginning of fiscal year 1987 . . . [causing the Employer] to remove $300 to $500 million from our operating budget''; that ''we embarked on a program entitled cost containment . . . it was of the same nature in terms of publicity''; that ''each region was given a specific goal in terms of dollars . . . headquarters was given a goal in terms of dollars . . . it was the same type of thing we did [under] the [instant] Omnibus Reconciliation Act''; and that there was

[4] The collective-bargaining agreement distinguishes between full-time employees who are guaranteed a 40-hour work week and part-time employees. Part-time regular employees are assigned regular schedules of less than 40 hours per week. Part-time flexible employees are, insofar as pertinent here, ''available to work flexible hours as assigned by the Employer.'' See art. 7 and R. Exh. 26. William Downes, director of contract administration for the Employer, explained that the Employer generally ''can adjust their schedules [those of part-time flexibles] upward and downward depending on the work load'' and the Union to his knowledge has never requested and there has been no bargaining over such reductions.

[5] Operations Director Nick Barranca identified R. Exh. 33 as a published predecisional cost analysis attributing a potential ''$210.9 million in savings to reductions in clerks and mail handlers associated with the new bulk mail system.'' See also Mulligan's testimony pertaining to changes in service known as the ''two C program'' (Tr. pp. 478–480) which also affected bargaining unit employees.

no request for or bargaining with the Union ''over the cost containment program.''

William Burrus, executive vice president of the Postal Workers Union, claimed on rebuttal that, ''with respect to the institution of area mail processing'' and ''automation'' programs by the Employer, the Union ''does not oppose and actually embraces automation'' and, consequently, has never ''asked to bargain over implementation of such programs.'' Burrus further claimed that, with respect to ''the institution of the bulk mail center system'' by the Employer,

> To my knowledge there were no Postal employees that were, no bargaining unit Postal employees, that were involuntarily transferred to the bulk mail centers.[6]

In addition, Burrus generally claimed that, ''with respect to decisions . . . concerning reductions in personnel or cuts in hours or services'' in prior years, he ''never asked for bargaining'' because he ''was not aware that the Postal Service was attempting to reduce labor costs and that was the basis upon which they were making the cuts''—''it had never been presented to the Union that I was aware of that such cuts would turn on labor costs.'' Burrus also claimed that he was not ''aware'' of any ''policy'' on the part of the Employer not to bargain over such determinations.

II. THE OMNIBUS BUDGET RECONCILIATION ACT OF 1987 AND THE EMPLOYER'S RESPONSE

Congress enacted the Omnibus Budget Reconciliation Act on December 22, 1987, requiring, inter alia, that the Employer reduce its operating budget by $160 million in the remaining months of fiscal year 1988 and by $270 million in fiscal year 1989; make corresponding payments to the employee health benefits fund; not fund these payments by borrowing the moneys or by increasing postal rates; and report its fiscal year 1988 implementation plan by March 1, 1988. (See G.C. Exh. 1(j), attachment 3.) As counsel for the Union notes in his brief, pages 1 to 3, Congress ''nowhere dictated any specific part of the [Employer's] budget which needed to be reduced''; ''most of the fiscal year 1988 mandate was met without affecting bargaining unit employees''; and ''all of the much steeper fiscal year 1989 targets are being met without such an impact.''

Postmaster General Preston Tisch, on December 23, 1987, announced that the Omnibus Budget Reconciliation Act ''requires us to reduce our expenditures by one and a quarter billion dollars over the next 21 months''; ''it specifically requires us to take $430 million out of our operating budget and the remainder from capital funds''; ''our plan to build or modernize badly needed postal facilities throughout the country will be virtually wiped out . . . we will cancel 50 percent of the projects scheduled for fiscal years 1988 and 1989 overall and 75 percent of those which would have gone forward in 1988''; ''new facility construction projects not under contract will be eliminated''; ''equipment intended to improve our productivity and our customer services will also be sharply curtailed''; ''we will be forced to make adjustments in postal operations'' closing selected post offices ''for the next two successive Saturdays''; ''some additional cutbacks in retail services are being considered''; ''transportation for some third and fourth class mail will be consolidated''; and ''all operating budgets at the division and headquarters levels are currently being reviewed and additional adjustments will be announced.'' (See R. Exh. 11.)

Assistant Postmaster General Mulligan testified that the Employer conferred with regional and headquarters personnel to identify areas for budget reduction. Mulligan explained:

> Basically I was responsible for defining the process by which we would address the issue of how we were going to reduce our expenses . . . eliciting ideas as to what our opportunities might be and orchestrating a discussion and debate about those issues and then recommending a course of action [to the deputy postmaster general].

Mulligan noted:

> [W]e had . . . a set of criteria that included, number one . . . it [the proposed savings] had to go in quickly [and] had to be recoverable fairly quickly too; secondly, we wanted to minimize the impact on service and that accounts for . . . the fact that we got two-thirds of the savings from . . . belt-tightening activities before we ever got into service related activities . . . thirdly, if we had to go into service, we wanted the impact on service to not only be limited but [also] defined and controllable; [and, finally,] we needed to be able to produce . . . some audit trail since the GAO had to audit it.

On December 23, as Union Vice President Burrus testified, Postal Service officials met with union officials and then ''shared with the unions the general areas that were under consideration to be cut''; the Employer ''would be closing selected substation retail service outlets the Saturday [after] Christmas and the Saturday [after] New Years,'' that is, December 26 and January 2; Burrus asked a number of questions; and further meetings were to be held. (See R. Exh. 11.) As counsel for the Employer notes in her brief at page 5, the Union ''made no request to bargain until January 21, 1988'' and no request for bargaining was made with respect to the two Saturday closings. (See G.C. Exh. 2.)

The Employer and the Postal unions met again on January 14, 1988. Union Vice President Burrus testified that the Employer ''had some additional information regarding the cuts that were anticipated''; that ''I suggested . . . several areas that the unions would propose for cuts''; that Burrus' proposed cuts included reducing ''premium pay'' for employees doing Sunday, nighttime, and overtime work and reducing nonunit ''casual employees''; and that the Employer ''included'' ''our suggestions in the things that were being considered.'' Assistant Postmaster General Mulligan explained that various proposals, including those from the Union which would have reduced labor costs, were rejected as inconsistent with the criteria as stated above, contrary to contractual obligations or contrary to law.

On January 20, Postmaster General Tisch announced, inter alia, ''For the past several weeks the U. S. Postal Service

[6] Cf. *Nichols v. Moore*, slip opinion, United States District Court for the Northern District of Alabama, dated November 14, 1975, attached to the Employer's brief; *Mail Handlers v. Postal Service*, 103 LRRM 307 (D.C. Neb. 1978); and *Columbia Local, Postal Workers Union*, 621 F.2d 615 (4th Cir. 1980); involving applications to enjoin involuntary transfers or reassignments of employees, including unit employees, under the bulk mail center program.

and its customers have wrestled with the problem of absorbing cutbacks in our operating budgets of $430 million over the next 21 months''; ''roughly three-fourths of all capital expenditures planned for this fiscal year were affected''; ''two-thirds of the reductions in our operating budget will be borne . . . through reduced administrative expenditures and adjustments in work hours''; ''the remaining third of the savings we must achieve will come from adjustments in service''; ''specifically . . . previously announced adjustments such as changes in our mail transportation system and deferral of the replacement of our computerized payroll updating and timekeeping system are continued''; ''an immediate moratorium has been placed on hiring for all administrative vacancies''; ''administrative expenditures, including training, travel, supplies and services will be sharply curtailed''; ''Sunday mail processing and collection plans will be adjusted''; and ''retail hours across the country will be adjusted by one half day per week on average . . . these adjustments are expected to be completed within the next 30 to 60 days to give local managers time to complete plans and to notify the public.'' (See R. Exh. 14. See also R. Exh 13, a memorandum issued by Deputy Postmaster General Michael Coughlin to regional postmasters on January 15, 1988.)

The Postal Service and representatives of the Charging Party Union met again on January 21. Union Vice President Burrus testified that he hand delivered to the Employer at the beginning of this meeting a copy of General Counsel's Exhibit 2. Union Vice President Burrus, in General Counsel's Exhibit 2, stated that the Employer had informed the Union on January 14 ''of the final decisions reached to implement the congressional mandated budget cuts'' and ''the Union is in need of more specific information''; propounded 12 questions; and ''request[ed] bargaining prior to the effective date of the service reductions and other areas directly affecting conditions of employment.'' The Employer gave the Union ''verbal responses'' to some of its questions at the meeting. Additional written responses were later transmitted to the Union. (See R. Exhs. 18, 19, and 20.) Assistant Postmaster General Mulligan attended this meeting. He recalled that he ''ran through an explanation of the process we used to identify potential areas of savings''; that ''it was anticipated there would be some'' ''reassignments of employees or changes in schedules or starting times''; that he communicated to the Union ''that [he was] hoping to absorb the work hours through less hiring and through reduction of overtime''; and that the

> same policy [was] reiterated about no layoffs, that there would be [an] attempt to achieve these savings through reductions in hiring and a reduction in overtime.

See also Transcript 466–472, and Respondent's Exhibit 15.[7]

On January 22, Deputy Postmaster General Michael Coughlin announced to regional postmasters that, with respect to the ''reduction of window operations and elimination of Sunday collections and outgoing processing,'' implementing instructions had been completed; ''while we all recognize the impacts these changes will have on our employees, it is imperative that those impacts be minimized to the extent possible and that all applicable provisions of the national agreements be strictly adhered to''; ''it is expected that window service adjustments will be effective February 13, 1988 and elimination of Sunday collections and outgoing processing will be effective February 14''; guidelines were enclosed; a ''bargaining unit impact checklist'' was enclosed noting, inter alia, ''has the local/regional union been notified per Article 12''; and noting, inter alia, ''make appropriate staffing and scheduling changes in accordance with national and local agreements including use of part time regulars and reduction of PTF hours.'' (See R. Exh. 17 and attachments.) This memorandum and attachments were forwarded to the Charging Party Union on January 27, 1988. (See R. Exh. 17.)

Charging Party Union and Postal Service representatives met again on January 29. Union Vice President Burrus testified that he complained ''that I had started receiving information . . . regarding the cuts that were going into effect . . . and it did not appear to be consistent with the instructions that we had previously received''; ''the Postal Service said they would investigate those specific areas''; ''there were a number of things discussed''; and agreement was reached on ''waiving the posting requirements of the contract.'' The parties agreed that that the local unions would be given the option to waive contract posting requirements. The parties later signed Joint Exhibit 1, embodying their agreement on waiving contract posting requirements, noting: ''the dates of implementation for window service adjustments and elimination of Sunday outgoing processing are February 13 and 14, 1988, respectively.'' And, Charging Party Union and Postal Service representatives held a final meeting on February 5. The parties, according to Union Vice President Burrus, discussed, inter alia, whether the planned reduction in window service would be 9 or 10 percent and whether or not it would be region or divisionwide.

As stipulated, on February 13, the Postal Service began a nationwide reduction of retail window service and, on February 14, began its elimination of Sunday collection and processing of outgoing mail. On February 19, the Postal Service responded in writing to various questions raised by the Charging Party Union and stated with respect to the Union's earlier request to bargain (G. C. Exh. 3):

> The Postal Service does not have an obligation to collectively bargain concerning changes in postal services. We will, however, continue to consult with you concerning such changes. To the extent that these changes affect terms and conditions of employment, we will follow the requirements of the national agreement.[8]

On February 26, the Postal Service sent its implementation plan for the fiscal year 1988 budget reductions to Congress. (See R. Exh. 1.) The plan included a servicewide administrative cost reduction program; a reduction of research and de-

[7] Union Vice President Burrus claimed on rebuttal that ''there was no mention by the Postal Service that they would absorb the lost hours through attrition. It was not raised at all by the Postal Service.'' Burrus added: ''As a matter of fact it was an issue that the Union raised as a means of absorbing the cuts imposed upon the Postal Service and the Postal Service rejected the Union's suggestions.''

[8] See also G.C. Exhs. 4 and 5 concerning the subsequent ''partial restoration of retail services'' in September 1988, where the Employer reiterated its refusal to bargain with the Union over such changes in postal service.

velopment funds; the proposed implementation of a carrier route information sortation system; the conversion of some air transportation to cheaper highway transportation; the elimination of some AMTRAK service; the increase in bulk mail center van utilization; the elimination of ZIP plus 4 look-up service provided through computer forwarding sites; the elimination of outgoing distribution on Sunday; a reduction in window service up to 10 percent; and the previous implementation of selected retail closings and reduced collections on the Saturdays following Christmas and New Years. As stated, only the last three items are the alleged unlawful unilateral actions in this proceeding.

On October 31, the General Accounting Office (GAO) issued its final report on compliance with the 1988 reduction mandate. (See R. Exh. 2.) As GAO noted:

> While GAO could not determine if all of the individual cost reduction initiatives achieved their intended savings, the Postal Service's overall efforts produced more than the $160 million in savings mandated.

GAO added:

> GAO could not determine the actual amounts saved for initiatives such as curtailing window service and Sunday collections that comprised the remaining $75 million of the $173.8 million savings goal. This was because savings depended on a reduction in operational work hours and an unknown number of those hours may have been shifted to other duties and functions.

Assistant Postmaster General Mulligan testified with respect to the impact of the Employer's reductions and savings. As for the closings on the Saturdays following Christmas and New Years, he explained:

> we didn't expect much business [on those 2 days] . . . we felt we could recover the great majority of the hours later . . . by reduction of part time flexible hours, which we can do under the contract, or by selling people on taking annual leave, a lot of people wanted off at Christmas . . . some people were shifted if they didn't want to take leave.

Assistant Postmaster General Mulligan further testified with respect to the impact of the reductions and savings in general. He noted that he had made clear to the unions that it was ''anticipated there would be some'' ''reassignments of employees or changes in schedules or starting times''; ''no lay offs''; and ''there would be an attempt to achieve these savings through a reduction in hiring and a reduction in overtime'';

> The way we intended to save . . . was to slow down or eliminate our hiring . . . and to reduce overtime . . . those two were the major impacters on savings.
>
> He observed that the savings ''came mostly [from] new hires not being hired . . . reduction of overtime . . . and to [his] knowledge [there was] very little impact on the average number of hours part time flexibles were working . . . almost no impact [on the] average number,'' and ''there were no layoffs of any employees.''[9]

Budget Director Burditt testified that there was a ''slight reduction'' ''in the total hours'' worked by part-time flexibles from fiscal year 1987 to 1988; there was a ''very minor'' change ''in the average number of hours worked by the part time flexible clerks from l987 to 1988'' ''less than a hundreth of an hour''; ''if you take from accounting period 6 on, the drop in the average hours worked [by the part time flexible] was about 15 minutes a week''; ''we didn't bring part time flexibles on to work because we had less work for them to do'' and there was ''a decrease in the number of employees on the rolls''; and

> based on the fact that the total number of part time flexibles dropped, it's more of a cost avoidance by not having people on the payroll, by not activating additional part time flexibles, rather than any damage; [as for the] average hours worked by a part time flexible . . . there wasn't that much of an impact on the individual that was already on board.

See Respondent's Exhibit 6 and Transcript 271–284.[10]

Budget Director Burditt was asked if there was anyway that he could determine how much of the approximated savings attributed to the alleged unilateral changes in issue here ''affects only unit personnel,'' and he explained:

> Not that I am aware of . . . the Postal Service and the GAO attempted to determine on tracking the costs on some of these items and we were not able to do it . . . the numbers just are not available.[11]

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[9] Assistant Postmaster General Mulligan acknowledged that ''all of'' the approximated $40 million in savings from window closings ''was directly related to labor costs''; ''we eliminated a segment of work; closed down a certain amount of time; and that meant a reduction in labor costs'' including unit labor costs. Mulligan added that ''it came mostly from new hires not being hired; reduction of overtime; and to my knowledge very little impact on the average number of hours part time flexibles were working, almost no impact [on the] average number.'' Mulligan further acknowledged that ''substantially if not all of'' the approximated $17 million in savings from the Sunday service reductions ''would be labor costs'' and those affected part-time flexibles ''might have had their hours reduced or they might have simply transferred to another day with their full hours as they were getting before.'' And, Mulligan similarly agreed that the two Saturday closures resulted in ''labor cost savings'' which could have resulted in ''some reduction in part time flexible hours; some people who volunteered to take annual leave; some people who were shifted . . . perhaps that day; I am not certain if there would have been any official schedule changes.''

[10] Budget Director Burditt also noted that a rate increase went into effect in fiscal year 1988 and he would attribute the 15-minute average loss per week to a decline in ''volume plan'' as a result of the increase. Cf. the testimony of Union Representative Phillip Tabbita and related documentary evidence pertaining to volume (Tr. 548–601) and the testimony of Assistant Postmaster General Mulligan (Tr. 513–514). As Assistant Postmaster General Mulligan explained, ''In the 4th quarter [of fiscal 1988] it [volume] barely increased over the last year and it increased much less than our planned level.''

[11] Counsel for General Counsel, in his posthearing brief (p. 13), acknowledges the uncertainty of unit impact in this case by stating, ''It very well may be that Respondent's changes ultimately affected

Continued

Finally, Budget Director Burditt observed that the approximated savings and reductions in issue here, some $60 million, reflect only 2 percent of the Employer's total labor costs for fiscal year 1988.

Union Vice President Burrus generally claimed, inter alia, that unit part-time flexible employees ''would lose pay under those Saturday closing situations''; that unit ''employees' hours were cut pursuant to the reductions in window services and in Sunday mail processing''; that ''some of our members were affected by the elimination of work on Sunday which has a 25 percent premium attached to it'' ''if the replacement job did not include Sunday as a workday''; and that ''it's not my testimony that there were layoffs of full time employees'' but ''some employees were laid off.'' (Cf. C.P. Exhs. 1 and 2.)

I credit the testimony of John Mulligan, Kenneth Burditt, Robert Templeton, William Downes, and Nick Barranca as summarized above. Their testimony is in significant part mutually corroborative. Their testimony is also substantiated in large part by undisputed documentary evidence. Their testimony is further substantiated in part by admissions of William Burrus. And, on this entire record, I am persuaded that the above-recited testimony of John Mulligan, Kenneth Burditt, Robert Templeton, William Downes, and Nick Barranca credibly and reliably relates both the background and current sequence of events. On the other hand, I find the testimony of William Burrus to be at times incomplete, vague, unclear, and unreliable. In particular, I do not credit the general assertions by William Burrus to the effect that there were layoffs of unit personnel as result of the Employer's reductions in service. Indeed, counsel for General Counsel conceded (Tr. 471–472) that he was ''not in a position to refute that'' there were no layoffs as a result of the reductions in window service and Sunday mail processing, and counsel for Charging Party Union does not press this testimony of William Burrus in his posthearing brief.

I find equally incredible and unreliable the general assertions of William Burrus to the effect that the Union never demanded bargaining with the Employer in prior years with respect to reductions or changes in service because it assertedly did not know that such changes turned on labor costs or because it did not oppose such changes. In my view, William Burrus has not credibly explained why the Union never requested bargaining in the past over decisions by the Employer which, on their face, had at least the same impact on unit personnel and labor costs as those in issue here. Further, I do not under the circumstances credit the related assertion of William Burrus to the effect that he was not aware of the Employer's ''policy'' not to bargain over the type of decisions which are in issue here. This assertion, on the record made here, appears to be contrary to the course of conduct between the Employer and the Union during a 17-year period of time. In addition, I find unreliable the broad and general assertions of William Burrus that unit employees lost hours as a consequence of the Employer's action in the instant case. These assertions were principally based on hearsay and the documentary evidence adduced by counsel for the Union does not reliably or sufficiently establish this claimed impact on unit personnel. (Cf. C.P. Exhs. 1 and 2.)[12] Accordingly, insofar as the testimony of William Burrus conflicts with the testimony of John Mulligan, Kenneth Burditt, Robert Templeton, William Downes, and Nick Barranca and related documentary evidence of record, I find the latter to be more complete, reliable, and trustworthy.[13]

Discussion

The fundamental question raised in this case is whether the Postal Service's budget cutbacks as a consequence of the Omnibus Budget Reconciliation Act of 1987 were mandatory subjects of collective bargaining within the meaning of Section 8(a)(5) and Section 8(d) of the National Labor Relations Act. The controlling principles of labor law were recently restated by the National Labor Relations Board in *Reece Corp*., 294 NLRB 448 (1989), as follows:

> In *Otis Elevator Co*., 269 NLRB 891 (1984), which applied the principles of the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) . . . the Board, in a plurality opinion, stated that the critical factor in determining whether a management decision is subject to mandatory bargaining under Section 8(d) is ''the essence of the decision itself, i.e., whether it turns upon a change in the nature of the business or turns upon labor costs.''

In *Reece*, supra, the Board, Member Johansen dissenting, found that the ''decision at issue did turn essentially on labor costs.'' The Board explained that ''a decline in demand for respondent's products was the initial impetus for the respondent's decision to consolidate operations''; ''but the reasons for the selection of . . . the plant whose operations would be relocated were essentially reflected in the bargaining over the 1980–1983 agreement and respondent's abortive efforts after the contract had gone into effect to achieve changes in that agreement with respect to matters that are undisputably related to labor costs.'' The Board noted:

> By contrast, there was no similar pattern of seeking union contract concessions in *Otis Elevator*, supra. In addition, a significant factor in the relocation there was the desirability of locating research and development operations near the parent corporation's plant and merging . . . operations. Those considerations had nothing to do with the collective bargaining agreement.[14]

only a few hundred employees and not several thousands of employees''; and ''it may very well be difficult to ascertain the identities of those who may be due backpay and the amount of the backpay due.'' Counsel for Charging Party Union, in like vein, also generally asserts in his posthearing brief (pp. 1–2) that ''work hours were obviously changed''; ''overtime was reduced''; and ''it is certain that some part time flexible employees lost hours.'' It is apparently undisputed that full-time employees sustained no loss in hours and, as noted below, there in fact were no layoffs.

[12] As counsel for the Employer notes in her posthearing brief (pp. 50–51), C.P. Exh. 1 consists in large part of hearsay and does not reliably or sufficiently show that unit part-time flexible employees in fact lost hours because of the determinations in issue here. C.P. Exh. 2, a decision on a grievance, also does not reliably or sufficiently establish such lost work hours.

[13] Counsel for Respondent Employer's motion to correct the transcript, which is unopposed, is granted. Counsel for Charging Party Union's motion to file its brief instanter, which is unopposed, is granted.

[14] The Board, in *Reece*, supra at fn. 6, ''applying former Member Dennis' test'' from *Otis*, as well as the test of former Member Zim-

See also *Inland Steel Container Co*., 275 NLRB 929, 935–937 (1985), enfd. 822 F.2d 559 (5th Cir. 1987), where the Board, in agreement with the administrative law judge, found

> that the essence of the ''decision'' itself was not predicated solely or even predominantly on labor costs, but was prompted largely by a need to replace an inadequate facility . . . the ''decision'' did not turn on labor costs [and] was not subject to mandatory bargaining.

FMC Corp., 290 NLRB 483 (1988), where the Board found ''that the decision to manufacture the . . . crane at Bowling Green involved a number of business reasons, including higher productivity, lower scrap costs and lower wage rates at Bowling Green,'' and did not violate Section 8(a)(5) ''under any of the views expressed in *Otis*''; *WXON-TV, Inc*., 289 NLRB 615 (1988), where the Board found that ''the essence of the decision to eliminate the production department was based on the failure of that department to generate revenues sufficient to justify its continued existence'' and was not a mandatory subject of bargaining even though reference to ''production department salaries . . . perhaps . . . played a role in triggering an attempt to increase revenues'' for, ''it does not follow that the decision therefore must have turned upon labor costs.''

Hawthorn Mellody, Inc., 275 NLRB 339 (1985), where the Board explained that although ''labor costs were a motivating factor'' for the transfer of operations, this factor was ''not dispositive'' labor costs ''must be more than one of the circumstances which stimulated the evaluation process for a bargaining obligation to attach.''

Dubuque Packing Co., 287 NLRB 499 (1987), where the Board, in agreement with the administrative law judge, found:

> while labor costs clearly were a factor in the . . . decision to relocate . . . the decision to relocate did not turn upon labor costs but upon the long range improbability of continuing this work in [the particular location].

Lapeer Foundry & Machine, 289 NLRB 952 (1988), where the Board concluded that ''the decision to lay off employees for economic reasons is a mandatory subject of bargaining.'' The Board explained:

> In deciding to lay off employees, management directly alters employees' terms of employment. This decision, like the decision to reduce workers' wages, necessarily turns on labor costs because the decision itself is to modify labor costs in order to save money during economic downturns.

merman, also concluded that ''a factor over which the union had control (i.e., labor costs) was a significant consideration in the employer's decision and that the benefit for the collective bargaining process outweighed the burden on the business, in view of the significant impact on the employees and the respondent's own effective admission . . . that concessions by the union might negate the necessity of going through the extensive effort required for the relocation.''

Applying the foregoing principles to the somewhat unusual and special circumstances of this case, I find and conclude that Respondent Employer's budget response to the mandate of Congress was not a determination which turned on labor costs and was therefore not subject to mandatory bargaining. And, insofar as the Employer's implementation of the mandate of Congress may have impacted on unit labor costs, the credited proofs show at best only some vague and incidental secondary effect. Thus, as recited supra, on December 22, 1987, Congress enacted the Omnibus Budget Reconciliation Act. The Employer was directed to take certain budget action within the ensuing 21 months. On the following day, December 23, Postmaster General Tisch announced that the Omnibus Budget Reconciliation Act ''requires us to reduce our expenditures by one and a quarter billion dollars over the next 21 months''; ''it specifically requires us to take $430 million out of our operating budget and the remainder from capital funds''; ''our plan to build or modernize badly needed postal facilities throughout the country will be virtually wiped out . . . we will cancel 50 percent of the projects scheduled for fiscal years 1988 and 1989 overall and 75 percent of those which would have gone forward in 1988''; ''new facility construction projects not under contract will be eliminated''; ''equipment intended to improve our productivity and our customer services will also be sharply curtailed''; ''we will be forced to make adjustments in postal operations'' closing selected post offices ''for the next two successive Saturdays''; ''some additional cutbacks in retail services are being considered''; ''transportation for some third and fourth class mail will be consolidated''; and ''all operating budgets at the division and headquarters levels are currently being reviewed and additional adjustments will be announced.'' (See R. Exh. 11.)

Assistant Postmaster General Mulligan, charged with the task of recommending ''a course of action'' with respect to the mandated $430 million reduction from the operating budget for the next 21 months, explained that ''we wanted to minimize the impact on service and that accounts for . . . the fact that we got two-thirds of the savings from . . . belt-tightening activities before we ever got into service related activities.'' In short, the Employer intentionally avoided impact on service activities and those unit and nonunit employees performing such activities. As counsel for the Union notes in his brief, pages 1 to 3, Congress ''nowhere dictated any specific part of the [Employer's] budget which needed to be reduced''; ''most of the fiscal year 1988 mandate was met without affecting bargaining unit employees''; and ''all of the much steeper fiscal year 1989 targets are being met without such an impact.''

On February 26, 1988, the Postal Service, after consultations and discussions with its regional managers as well as union representatives, sent its implementation plan for the fiscal year 1988 budget reductions to Congress. (See R. Exh. 1.) The plan included a servicewide administrative cost reduction program; a reduction of research and development funds; the proposed implementation of a carrier route information sortation system; the conversion of some air transportation to cheaper highway transportation; the elimination of some AMTRAK service; the increase in bulk mail center van utilization; the elimination of ZIP plus 4 look-up service provided through computer forwarding sites; the elimination of outgoing distribution on Sunday; a reduction in window serv-

ice up to 10 percent; and the previous implementation of selected retail closings and reduced collections on the Saturdays following Christmas and New Years. As stated, only the last three items are the alleged unlawful unilateral actions in this proceeding.

Assistant Postmaster General Mulligan testified with respect to the impact of the Employer's reductions and savings in its operating budget. Mulligan had made clear to the unions that it was ''anticipated there would be some'' ''reassignments of employees or changes in schedules or starting times''; ''no lay offs''; ''there would be an attempt to achieve these savings through a reduction in hiring and a reduction in overtime'';

> [t]he way we intended to save . . . was to slow down or eliminate our hiring . . . and to reduce overtime . . . those two were the major impacters on savings.

He explained that the approximated $40 million in savings from window closings ''came mostly from new hires not being hired; reduction of overtime; and to my knowledge very little impact on the average number of hours parttime flexibles were working, almost no impact [on the] average number.'' He explained that, with respect to the approximated $17 million in savings from Sunday service reductions, those affected part-time flexibles ''might have had their hours reduced or they might have simply transferred to another day with their full hours as they were getting before.'' And, he explained that the two Saturday closings following Christmas and New Years could have resulted in ''some reduction in part time flexible hours . . . some people who volunteered to take annual leave . . . some people who were shifted . . . perhaps that day; I am not certain if there would have been any official schedule changes.''

In addition, Budget Director Burditt testified that there was a ''slight reduction'' ''in the total hours'' worked by part-time flexibles from fiscal year 1987 to 1988; there was a ''very minor'' change ''in the average number of hours worked by the part-time flexible clerks from l987 to 1988'' ''less than a hundreth of an hour''; ''if you take from accounting period 6 on, the drop in the average hours worked [by the part time flexible] was about 15 minutes a week''; ''we didn't bring part time flexibles on to work because we had less work for them to do'' and there was ''a decrease in the number of employees on the rolls.'' Burditt noted that a rate increase went into effect in fiscal year 1988 and he would attribute the 15-minute average loss per week to a decline in ''volume plan'' as a result of the increase. And, finally, Burditt was asked if there was anyway that he could determine how much of the approximated savings attributed to the alleged unilateral changes in issue here ''affects only unit personnel,'' and he explained:

> [n]ot that I am aware of . . . the Postal Service and the GAO attempted to determine on tracking the costs on some of these items and we were not able to do it . . . the numbers just are not available

Indeed, as GAO stated in its report to Congress:

> GAO could not determine the actual amounts saved for initiatives such as curtailing window service and Sunday collections that comprised the remaining $75 million of the $173.8 million savings goal. This was because savings depended on a reduction in operational work hours, and an unknown number of those hours may have been shifted to other duties and functions.

Significantly, we deal with a unit of some 270,000 full-time employees and 70,000 part-time employees; approximated savings from budget reductions in issue that are only .2 percent of the Employer's total labor costs for fiscal year 1988; no lay offs of unit personnel; no loss of hours of full-time unit personnel; and no sufficient or reliable showing of any loss of hours of part-time unit employees attributable to the determinations in issue here.

On this record, I find that the Employer, in responding to the budget mandate of Congress, was not motivated by labor costs, its determinations did not turn on labor costs, and to the extent there was an impact on unit labor costs, such impact was incidental and secondary. See *Reece Corp*., supra, and cases discussed above. As demonstrated above, the total mandated reductions involved much more than the three determinations placed in issue here. And, with respect to the reductions in the fiscal year 1988 operating budget expenses . . . only a part of the overall reductions . . . two-thirds of these reductions involved nonlabor costs despite the fact that over 80 percent of the Employer's operating expenses are labor costs. Moreover, as also demonstrated above, counsel for General Counsel and Charging Party Union have failed to sufficiently establish here by reliable and credible proofs that the Employer's alleged unilateral changes had a substantial or significant impact on unit employees. As Assistant Postmaster General Mulligan explained, the approximated savings in issue here ''came mostly [from] new hires not being hired . . . reduction of overtime . . . and to [his] knowledge [there was] very little impact on the average number of hours part time flexibles were working . . . almost no impact [on the] average number,'' and ''there were no layoffs of any employees.'' The proofs adduced by General Counsel and Charging Party Union do not provide us with more detailed and credible evidence of the requisite showing of unit impact. In short, except for the general acknowledgement by the Employer that it reduced planned work hours by attrition and by an unspecified reduction in overtime, there is no credible or sufficient or reliable showing of a loss of unit work hours attributable to the service reductions in issue here. Cf. *First National Maintenance*, supra, 452 U.S. at 678–679; *United Technologies Corp*., 274 NLRB 609, 621 (1985); *Eastgate I.G.A. Foodliner*, 236 NLRB 1305, 1314 (1978); *Westinghouse Electric Corp*., 150 NLRB 1574 (1965).

There remains for resolution the question whether the Employer fulfilled its obligation to bargain with the Union over the effects of the above determinations and changes. Counsel for the Employer argues that Charging Party Union waived its right to bargain over the effects of these determinations and changes.[15] As noted above, articles 12 and 37 of the collective-bargaining agreement provide for the reassignment of

[15] Counsel for the Employer also argues that the Union waived its right to bargain over the decisions in question. In view of my determination that the Employer was not obligated to bargain with the Union over the decisions in issue here, I find it unnecessary to reach this issue and related contentions of the parties. Cf. *Reece Corp*., supra.

unit employees and posting of new assignments, including the discontinuance of an independent installation and the consolidation of an installation. Templeton, a regional manager of labor relations for the Postal Service, testified that article 12 applies ''regardless of the reason the employee is being excessed from the section'' including a ''reduction in service''; that the Postal Service is not obligated to bargain over such decisions and to his knowledge has never bargained over a decision to ''excess or reassign an employee''; that there have been ''hundreds'' of such instances over the years; and that one such decision pertained to the establishment of the Employer's 21 national bulk mail centers in the 1970s which involved the reassignment of ''thousands'' of employees. Templeton explained on cross-examination that part-time flexible employees are also covered by article 12. (See art. 12.5C8 of Jt. Exh. 2.) Templeton further testified that article 37, which applies to clerk craft employees, provides for changing the scheduled workdays, duties, and starting times for full-time employees; that a ''lot of things could happen'' to cause such a change including ''a change in transportation,'' ''a drop in mail volume,'' the use of ''area mail processing'' or a ''scheduling staffing study'' or ''function review''; and that here too ''there is no bargaining'' and the Employer is only required to comply with the provisions of the contract. Moreover, as detailed above, the Employer in the past has made numerous changes in its operations and services without affording the Charging Party Union an opportunity to bargain over the underlying decision. The Employer's changes, however, must concededly be in compliance with the pertinent provisions of its collective-bargaining agreement which principally pertain to the effects of such decisions.

There is no question here that the Employer fully complied with the extensive effects provisions of its collective-bargaining contract with the Union. In fact, the parties, during one of their five meetings, on January 29, agreed that that the local unions would be given the option to waive contract posting requirements contained in these effects provisions. The parties later signed Joint Exhibit 1, embodying their agreement on waiving contract posting requirements, noting: ''the dates of implementation for window service adjustments and elimination of Sunday outgoing processing are February 13 and 14, 1988, respectively.'' In sum, the parties have negotiated extensive contract procedures which provide how operational changes such as reassignments and schedule changes will impact on unit employees. The parties complied with these contract procedures here. Under the circumstances, the Charging Party Union waived any right to bargain further over these effects and the Employer, by fully complying with these provisions, has fulfilled its bargaining obligation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. Charging Party Union is a labor organization as alleged.

3. Respondent has not violated Section 8(a)(5) and (1) of the Act as alleged and the complaint will be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]